

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

ENERPOL, LLC

Plaintiff,

V.

SCHLUMBERGER TECHNOLOGY
CORPORATION,

Defendant.

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Civil Action No. 2:17-cv-394-JRG

JURY TRIAL DEMANDED

MOTION FOR ENTRY OF FINAL JUDGMENT AND DISMISSAL OF COUNTERCLAIMS

EnerPol, LLC (“EnerPol”) moves for a judgment of non-infringement because EnerPol cannot prove its case of infringement as to all asserted claims of U.S. Patent No. 6,949,491 (“the ‘491 patent”) based on the Court’s claim construction of the terms “polymer-continuous liquid phase,” and “continuous liquid phase.”

This motion is filed as opposed because EnerPol and Schlumberger Technology Corporation (“Schlumberger”) were unable to agree to the language of a stipulation. EnerPol’s signed stipulation of non-infringement, based on the Court’s complete construction of “polymer-continuous liquid phase,” and “continuous liquid phase,” is attached as Exhibit A.

During the mediation on March 22, 2018, EnerPol and Schlumberger entered into a Memorandum of Agreement as follows:

EnerPol, LLC (“EnerPol”) and Schlumberger Technology Corporation (“Schlumberger”) (collectively, “the Parties”) agree that they will enter and file a stipulation of noninfringement based on the Court’s claim construction order (ECF No. 111) not later than Thursday, March 29, 2018, with each side bearing its own costs. The parties further agree that, as part of the Stipulation of Noninfringement, Schlumberger will dismiss its counterclaims

without prejudice.

Exhibit B. On the same date, EnerPol and Schlumberger also agreed to a halt to all discovery activities. The parties twice agreed to extend the deadline for compliance with the Memorandum to April 5, 2018.

Over the past two weeks, EnerPol sent several drafts of a proposed stipulation to Schlumberger, but Schlumberger refused to join the stipulation absent express commitments by EnerPol limiting appeal rights. Specifically, Schlumberger sought a commitment by EnerPol not to raise certain issues (e.g., the Court's requirement that the "polymer-continuous liquid phase" and "continuous liquid phase" contain "polymer in a liquid state") in appeal to the Federal Circuit. EnerPol cannot and need not agree to such limitation of its appeal rights as a prerequisite to a judgment of noninfringement.

The Court's claim construction order also construed the terms "solid form," "selected," and "low-viscosity." While EnerPol surrenders no appellate rights as to those terms, their impact on the outcome of this case is not part of the present stipulation.

So to preserve its rights and to comply with the mediated Memorandum of Agreement signed by both parties, EnerPol hereby takes the unusual step (for a patent plaintiff) of moving for judgment of noninfringement and non-prejudicial dismissal of Schlumberger's affirmative defenses and counterclaims of invalidity and unenforceability of the '491 patent, and non-prejudicial dismissal of Schlumberger's counterclaims of infringement of U.S. Patent Nos. 7,565,929; 8,183,179; and 8,220,543. The proposed order, attached hereto, is consistent in form and substance with other stipulated judgments entered in this district.¹

¹ See, e.g., *Rotatable Techs. LLC v. Nokia Inc.*, No. 2:12-cv-265 (E.D. Tex. Sept. 18, 2013), ECF #121 (attached as Exhibit C); *Cioffi v. Google, Inc.*, No. 2:13-cv-103 (E.D. Tex. Dec. 2, 2014), ECF #104 (attached as Exhibit D).

Dated: April 5, 2018

Respectfully submitted,

FISH & RICHARDSON P.C.

By: /s/ Robert P. Courtney

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**ATTORNEYS FOR PLAINTIFF
ENERPOL, LLC**

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document is being filed electronically in compliance with Local Rule CV-5(a). As such, this document is being served on all counsel who are deemed to have consented to electronic service. Local Rule CV-5(a)(3)(A). Pursuant to Federal Rule of Civil Procedure 5(d) and Local Rule CV-5(d) and (e), any counsel of record not deemed to have consented to electronic service are being served with a true and correct copy of the foregoing by email on this 5th day of April 2018.

/s/ Robert P. Courtney

Robert P. Courtney

CERTIFICATE OF CONFERENCE

The undersigned certifies that the parties have met and conferred extensively in an attempt to reach agreement on this issue. The parties met telephonically on March 28, April 2, and twice on April 4, 2018. Participants included: **For EnerPol**—Mathias Samuel, Esq.; Robert Courtney, Esq.; Bo Davis, Esq.; Nitika Gupta Fiorella, Esq.; Jane Du, Esq.; **For Schlumberger**—Hon. T. John Ward, Esq.; Claire Henry, Esq.; Gabriel Bell, Esq.; and the mediator Gil Gillam also attended several of these conferences. Discussions conclusively ended in an impasse when Schlumberger stated that it cannot agree to remove the language limiting the scope of EnerPol's appeal.

/s/ Robert P. Courtney

Robert P. Courtney